IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 18130 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KUNDANBEN JAYANTILAL SANGHVI

Versus

STATE BANK OF SAURASHTRA

Appearance:

1. Special Civil Application No. 18130 of 2003

MR ASPI M KAPADIA for Petitioner No. 1-2

MR AS VAKIL for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 07/07/2004

ORAL JUDGEMENT

1. Rule. Mr.A.S.Vakil, learned Counsel for the respondent Bank waives service of notice of rule. With

the consent of the parties the matter is taken up for final hearing today.

2. The short facts of the case are that the petitioners are claiming the right as purchaser of the property under Section 53A of the Transfer of Property Act under the agreement to sell with part performance and the said property appears to have been mortgaged with the respondent Bank. It is the case of the petitioners that when the petitioners purchased the property, it was not disclosed to them that the property is mortgaged with the Bank. It also appears that as per the petitioners the property was mortgaged in the year 1988 and the agreement to sell upon which the reliance is placed by the petitioners has entered into in the year 1990. Even if the original documents, copy whereof is produced on page 20 is considered, the stamp paper is purchased on 29-1-1986, whereas it is used for entering into transaction on 11-10-1990 i.e. after a period of expiry of six months.

The respondent Bank issued notice dated 3-11-2003 under "Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002" (hereinafter referred to as "the Ordinance") under Section 13(2) for recovering of the amount outstanding from the borrower as well as the guarantor. As per the Bank, Rambhai Kavalbhai Patel was the original owner of the property in question stood as the guarantor and the said property was mortgaged with the Bank. It is the said notice of the Bank which is under challenge in this petition by the petitioners. The petitioners have also prayed for challenging the communication dated 15-12-2003, whereby the bank addressed a correspondence giving copy of the notice dated 3-11-2003 issued to Rambhai K. Patel and intimated to the petitioners that upon the expiry of the period of 60 days, the Bank will proceed for public auction of the said property and the petitioners are intimated to surrender the vacant possession of the land of property. The petitioners have also prayed to restrain the respondent Bank from recovering the forcible possession of the flat No.5 in question and the petitioners have also prayed for giving directions to respondent Bank to supply to the petitioners necessary documents and details which may be as per the notice dated 20-11-2003 and the second notice dated 19-12-2003.

3. I have heard Mr.Kapadia, learned Counsel for the petitioners and Mr.A.S.Vakil, learned Counsel for the respondent Bank.

4. Mr.Kapadia appearing for the petitioners firstly raised the contention that the notice has been issued under Ordinance which has been repealed and, therefore, when the Ordinance is repealed by substitution of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act"), the notice could not have been issued under the Ordinance.

5. On behalf of the respondent Bank, it has been submitted by Mr.Vakil that, the substance of the notice is to be seen for exercise of the power under the Act and not the heading or title of the notice. Mr.Vakil submitted that notice is in terms of Section 13(2) of the Act and is for taking action under Section 13(4) of the Act on expiry of 60 days and, therefore, he submitted that the notice would not fail, merely because there is a reference to the Ordinance.

6. In my view, considering the facts and circumstances of the case and the reasons stated hereinafter, the said aspects would not be of much relevance for the purpose of deciding this petition and the appropriate directions in this regard will follow as stated hereinafter in the subsequent portion of the judgement.

7. Mr.Kapadia, learned Counsel appearing for the petitioners mainly submitted that the petitioners have purchased the property and the petitioners being the purchaser of the property and in possession of the property in question, the power under Section 13(4) cannot be exercised for taking possession and the only right, in the submission of Mr.Kapadia is to call upon the purchaser of the property to pay the outstanding amount, if any, to the owner of the property by paying to the Bank and he submitted that, if any, right on the basis of mortgage with the Bank is to be enforced, the only option left to the petitioners are to file suit for foreclosure of the mortgage as per the Transfer of Property Act and it is not open to the Bank to take the possession directly from the purchaser of the property who has acquired the rights over the property. Section 13(4) of the Act reads as under:

> "13(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:_

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(c) asspoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

8. The language of Sub section (4) Clause (d) upon which the reliance is placed by Mr.Kapadia is clear in as much, as such clause would apply to a person who has acquired any of the secured assets from the borrower. The petitioners admittedly are holding an agreement to sell and there is no registered sale-deed executed by the owner of the property in favour of the petitioners. As per the provisions of Transfer of Property Act, the person will acquire the property only if a conveyance is executed in his favour and entering into any transaction by agreement to sell any immovable property would not create any right in favour of the proposed purchaser of the property. Mr.Kapadia also made an attempt to submit that since an agreement to sell is for delivery of the possession under Section 53A of the Transfer of Property Act and, therefore, the petitioners are entitled to have the protection of the possession against any other person, including the Bank. He also submitted that even if it is considered that the rights of the petitioners, would be against any person claiming right in the property which were of the transferor, then also as per his submission, the Bank is claiming the right through the original owner of the property who is transferor and, therefore, Mr.Kapadia submitted that the Bank would not be entitled to take possession of the property in question in view of Section 53(A) of he Transfer of

Property Act. In my view, the said contention is ill-founded in as much as the respondent Bank is enforcing the right as the mortgagee of the property and the Bank is not enforcing the right as that of mortgagor. If any person is claiming right in capacity as the owner of the property i.e. transferor or through transferor, possibly such protection may be available to the person who is in possession under Section 53A of the Transfer of Property Act, but if a property is mortgaged to a Bank and after such mortgage, an agreement for sale is entered into and possession is transferred by the mortgagor to some third party, the proposed purchaser would not be entitled to have the protection under Section 53A against the mortgagee of the property when it is sought to be enforced under the Act, because as per the language of Section 13(1) the Act, the same is having over-riding effect over the provisions of Transfer of Property Act. Therefore, if the petitioners have not acquired lawful interest in the property as per the provisions of Transfer of Property Act and if the petitioners would not be entitled to the benefits and the protection under Section 53A of the Transfer of Property Act, against respondent bank in capacity as mortgagee, the petitioners cannot validly press in service the provisions of Section 13(4) Clause (d) of the Act as sought to be canvassed by Mr.Kapadia on behalf of the petitioners. Since the petitioners are found to be having not acquired the security assets, it would not be necessary to examine the larger questions as to whether the rights of the Bank as mortgagee of the property can be enforced under Section 13(4) even if registered sale deed is executed by borrower for taking possession of the property or not. In the present case, the property legally has continued to remain with the mortgagor and the respondent bank is enforcing the security interest over the property which is mortgaged. Merely because in respect of the property which is mortgaged, the agreement to sell is entered into, will defeat and frustrate the rights of the Bank, nor it cannot be said that the Bank will not be entitled to enforce its security interest over the property which is legally belonging to the mortgagor or the borrower or guarantor as the case may be.

9. Mr.Kapadia, learned Counsel appearing for the petitioners, submitted that the petitioners are a bonafide purchaser of the property and in his submission even in the agreement to sell, it has been mentioned that the property is not mortgaged to anyone and he also submitted that the transaction of mortgage by the Bank with the original owner of the property is not by any registered document and, therefore, the rights of the

petitioner cannot be allowed to be frustrated in such a situation, more particularly when the petitioner had made the payment by cheque of Rs.2,90,000/= and by cash of Rs.20,000/=. Whether the petitioners a bonafide purchaser or not, in my view, are essentially the question of facts, which cannot be conveniently examined by this Court in exercise of power under Article 226 of the Constitution. However, two aspects may incidently be mentioned; one is that the so-called agreement to sell is on stamp-paper of Rs.10/= which was purchased in the year 1986 and the same was used in the year 1990 and the second aspect is that as per the law prevailing in the State, agreement to sell in respect to immovable property with possession or without possession is required to be registered and the said documents upon which the reliance is placed by the petitioners is not registered with the concerned Registrar. Therefore, whether such transaction upon which the reliance is placed by the petitioners is bonafide or genuine or malafide with the purpose to defeat the rights of the bank as mortgagee, cannot be concluded unless and until both the parties are given opportunities and questions of facts are examined by the proper forum.

10. As per the decision of the Apex Court in the case of "Mardia Chemicals Ltd. v. Union of India", reported in 2004(4) SCC, 311" if any measure is taken under Section 13(4) of the Act by any financial institution or bank, there is express remedy provided under Section 17(1) of the Act to the party concerned and the view taken by the Apex Court is that such remedy is not as that of appeal, but is like original proceedings. Therefore, as and when such remedy is resorted to by the petitioner before the appropriate forum, the question regarding the status of the petitioner as bonafide purchaser or otherwise can be gone into at the trial or the Debt Recovery Tribunal (DRT) may examine such questions of facts, but at this stage in a petition under Article 226 of the Constitution for challenging the action under Section 13(4), it cannot be concluded that the petitioners are a bonafide purchaser of the property in question. Mr.Kapadia, learned Counsel appearing for the petitioner, has also raised the contention that as per the provisions of the Act, the notice is required to be served to the borrower and the borrower includes the guarantor but the guarantor has expired long back. He submitted that notice is required to be issued to the legal heirs of the guarantor and the liability of the legal heirs should also be fixed to the extent of the property which is inherited by the legal heirs from the gurantor. He also submitted that as such in such a

situation, the provisions of the Act cannot be invoked and the proper steps are required to be taken under Indian Succession Act and other relevant provisions of the Act and, therefore, he submitted that in absence of action being taken by the Bank, the present action of the Bank cannot be maintained. In my view, it may not be required for this Court to examine such question in view of the express remedy available to the petitioner under Section 17 of the Act, in view of the aforesaid decision of the Apex Court in the case of "Mardia Chemicals" (supra). It is well settled that when there is already efficacious remedy available to the party, this Court by way of self-imposed restriction may decline to interfere. In the present case, when full-fledged forum is available for examining such question, I find that such aspect should not be examined at this stage when the Bank has yet to take action under Section 13(4) of the Act for taking over the possession of the property.

11. Mr.Kapadia also made an attempt to submit that the remedy of approaching before the Tribunal under Section 17 of the Act would be rendered illusory, because the petitioners are in possession of the property, and if they are thrown away from the property, such remedy cannot be said to be efficacious or alternative remedy and, therefore, this Court may interfere at this stage under Article 226 of the Constitution of India. I am afraid such contention can be accepted in view of the decision of the Apex Court in case of "Mardia Chemicals" (supra). While upholding the constitutional validity of the Act, it has been read by the Apex Court that the Bank may consider the response of the borrower or the person against whom the action is to be taken, but the same will not give rise to the cause of action for challenging the action at this stage. In my view, the only remedy which can be resorted to by the petitioner would be after the measure is taken under Section 13(4) of the Act, before the Tribunal under Section 17 of the Act. I cannot accept the contention of Mr.Kapadia that the remedy would be illusory because it is only after the possession is taken over, the remedy is to be resorted to in view of the decision of the Apex Court in case of "Mardia Chemicals" (supra).

12. In view of the above, as such the petitioners have not been able to successfully claim any writ to prohibit the Bank from exercising the power under the Act, however, as there is reference in the notice to the Ordinance which is admittedly repealed, though the substance of the notice is for calling upon the borrower and the guarantor to pay the amount and to take action

under Section 13(4) of the Act, I am of the view that if the respondent Bank is directed to issue a fresh notice under Section 13(2) of the Act and the opportunity is given to the Bank to take action under Section 13(4) of the Act, no serious prejudice will be caused to the respondent bank and, therefore, I find that it is not necessary for this Court to examine the question as to whether for testing the legality and validity of the notice, the substance of the notice is to be seen or the detail or the reference made to the Ordinance is to be considered. As such in view of the directions given hereinafter, such aspect, in my view, would be rendered academic.

13. In view of the aforesaid I find that following directions be issued that -

13.1. The respondent Bank shall be at the liberty to issue a fresh notice under Section 13(2) of the Act for taking measures under Section 13(4) of the Act against the property in question by serving the same to the legal heirs of the guarantor namely Rambhai K. Patel for recovery of the amount and for enforcement of the security interest.

13.2. It will be open to the petitioner to make representation to the Bank in case the petitioners are so desirous.

13.3. The Bank may consider the representation of the petitioner, if made and shall be at the liberty to take action under Section 13(4) of the Act in accordance with law.

13.4. After any action or measure is taken under Section 13(4) of the Act, it would be open to the petitioner to approach before the DRT under Section 17 of the Act and if any such application is made, DRT shall be at liberty to decide the application independently without being in any manner influenced by any of the observations made by this Court in this judgement.

14. The petition is disposed of in terms of the directions. Rule discharged accordingly. Considering the facts and circumstances no order as to cost.

15. Since the petitioner has deposited the amount of Rs.80,000/= in pursuance of the interim order passed by

this Court, and as the petition is finally decided, the office shall refund the said amount to the petitioner by "Account payee" cheque.

7-7-2004 (Jayant Patel, J.)

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